SUPREME COURT, U. S.

FILED

AUG 10 1966

JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 431

BOSS HOTELS COMPANY,
Petitioner,

vs.

CITY OF DES MOINES, IOWA, CHARLES ILES, GEORGE WHITMER, JENS GROTHE, WALLACE BUSS, GEORGE NAHAS, Members of the City Council of the City of Des Moines, Iowa, RIVER HILLS MOTOR INN COMPANY, F. W. WEITZ and NATIONAL MOTOR INN CORP.,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Iowa.

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**To the Supreme Court of Iowa.**

Petitioner, Boss Hotels Company, an Iowa corporation engaged in the hotel business, seeks a review by this Court of the decision and judgment of the Supreme Court of the State of Iowa; and as grounds therefor states:

(a) The opinion of the court below is unofficially reported as Boss Hotels Company v. City of Des Moines, Iowa, et al., 141 N. W. 2d 541; Advance sheet # 4, not yet published in the Official Iowa Reports. Timely petition for

rehearing was denied by the Iowa Supreme Court on May 11, 1966.

(b) The judgment sought to be reviewed is dated April 5, 1966, and was entered on such date. The Iowa Supreme Court denied petition for rehearing on May 11, 1966, and the judgment then became final. No application for extension of time for filing this petition has been made. The jurisdiction of the court is based upon the act of June 25, 1948, chapter 646, § 1, 62 Stat. 927, effective September 1, 1948, and Rule 19 of the court.

(c) Boss Hotels Company brought an action in equity praying for an injunction enjoining the City of Des Moines and members of the City Council, River Hills Motor Inn Company, Weitz and National Motor Inn Corp. from entering into or perform any contracts for the sale of Urban Renewal parcels T-1 and T-3. The Urban Renewal Plan which had been duly adopted by the City incorporated the provisions of the Des Moines Zoning Ordinance, and such ordinance restricted the erection of structures on parcels T-1 and T-3 to three stories. Under the Federal statute known as the Housing Act of 1949 as Amended, the City had contracted with the Federal Government to sell Urban Renewal property only to persons who would use it in accordance with the Urban Renewal Plan. Also the Iowa statute implementing Urban Renewal required that the City require purchasers of Urban Renewal land to devote the land to the uses specified in the Urban Renewal Plan. The City offered parcels T-1 and T-3 for sale. Under competitive bidding Boss Hotels made an offer to purchase parcel T-3 and the evidence shows it was interested in making an offer on parcel T-1. The City proposed to sell parcel T-3 to River Hills Motor Inn Company and to sell parcel T-1 to National Motor Inn Corp. despite the fact that each proposed to erect structures of five stories or more in height. The question presented for review is

whether the Iowa Court should have granted the injunction in the light of the circumstances that the Iowa Urban Renewal statute required the property sold to be devoted to the uses specified in the Urban Renewal Plan, that the City had contracted with the United States to sell such property only for uses only in accordance with the Urban Renewal Plan, that the bulk of the entire Urban Renewal program was financed with Federal funds, and that Boss proposed to erect a motor hotel partly of 2 stories and partly of 3 stories on parcel T-3.

(d) The statutes, ordinances and regulations which the case involves are as follows:

1. Section 1 of chapter 14-1 of the Urban Renewal Manual (Regulations) issued by the Home and Financing Administration provided in part as follows:

"Realization of the redevelopment contemplated by the Urban Renewal Plan is the principal objective of the LPA-S LPA Land Disposal Activity."

2. Section 403.8 Code of Iowa 1962 provides:

"A municipality may sell . . . real property . . . in an urban renewal area for . . . commercial . . . or other uses . . . The purchasers . . . shall be obligated to devote such real property only to the uses specified in the Urban Renewal Plan . . ."

3. Section 2A-24 of the Des Moines Zoning Ordinance provided as follows:

"Height regulations. No building shall exceed three (3) stories or forty-five (45) feet in height . . ."

(e)-(f). A statement of the case is as follows: Plaintiff, Boss Hotels Company, hereafter called "Boss", is an Iowa corporation and a taxpayer, of Des Moines, Iowa. The Defendants are the City of Des Moines, the members of its City Council, hereafter called "City", River Hills

Motor Inn Company and F. W. Weitz, hereafter called "Sheraton", and National Motor Inn Corp., hereafter called "National Motor Inn".

Boss prayed for an injunction restraining the City and Sheraton from entering into or performing a contract for the sale and purchase of parcel T-3 in River Hills Urban Renewal area, and also sought a permanent injunction restraining the City and National Motor Inn from entering into or performing a contract for the sale and purchase of parcel T-1.

Reference will be made to the Urban Renewal Board of the City. Such Board is a statutory agency with authority to act in an advisory capacity to the City Council in reference to urban renewal matters. Mention will also be made of the Housing and Home Finance Agency; such agency is a Federal authority created by the Housing Act of 1949 as amended. The Federal Urban Renewal Administration is a branch of the Housing and Home Finance Agency. The Urban Renewal Administration for the Des Moines area is conducted in Region 4 thereof at Chicago. The Urban Renewal Manual (Rec. 139; 42) is a federal manual having the force and effect of law in governing the administration of Urban Renewal in the Federal area. Mention will also be made of a Kansas corporation, Inn Operations, Inc., and will be hereafter referred to as "Holiday".

In October of 1955 an ordinance was passed by the City Council of Des Moines appointing a Redevelopment and Housing Administrator. In 1957 the City Council selected "River Hills" (called in Federal terminology Iowa R-1), as the first urban renewal project in Des Moines. In December of 1957, a public hearing was held after which River Hills was officially declared an urban renewal project by the City Council. In February of 1959 a "workable" program was completed by the City's Department

of Redevelopment and Housing and submitted to the Housing and Home Finance Agency, which agency in May of 1959 wired certification and acceptance of the "workable" program. On November 30, 1961, the Urban Renewal Administration approved an amended River Hills Plan.

The River Hills Urban Renewal area is generally bounded by East Sixth Street on the East, University Avenue on the North, Sixth Avenue on the West and Grand and Crocker Streets on the South. Parcels T-1 and T-3 are located on the South side of the freeway as shown in the Plat (R. 208). Parcel T-1 contains 121,725 square feet and Parcel T-3 contains 127,928 square feet.

The City and the Federal government entered into a Loan and Grant Agreement following adoption and approval of the original Urban Renewal Plan. Among other matters such agreement obligated the Federal government to loan the City several millions of dollars to enable the City to have funds with which to acquire the land in the River Hills Urban Renewal area, and further provided that after acquisition, razing and sale of the properties in the area, the ultimate net cost of the project would be borne two-thirds by the Federal government and one-third by the City.

The Loan and Grant Agreement (R. 134) obligated the City to carry out the project in accordance with the Urban Renewal Plan. In the contract the City further agreed to refrain from selling any Urban Renewal land "except in accordance with and in order to carry out the Urban Renewal Plan." The City also agreed that any land sold would be made available "at not less than its fair value for use in accordance with the Urban Renewal Plan." In the contract the City further agreed that it would obligate the purchasers of Urban Renewal land "to devote such project land to the uses specified in the Urban Renewal Plan."

The City proceeded to purchase and raze the land in the Urban Renewal area and caused Parcels T-1 and T-3 to be platted as such. The City then proposed to sell such parcels to redevelopers such as Plaintiff, Sheraton, National Motor Inn and Holiday. At Record page 209 is the Urban Renewal Plan effective as of the time when the proposal or bids of Plaintiff, Sheraton, National Motor Inn and Holiday were filed and submitted to the City through the Urban Renewal Board. On the frontis page of Ex. 4 it is indicated that the Urban Renewal Plan was adopted October 1, 1959 and revised July 1, 1961 and November 1, 1962; such dates are the dates when the City Council approved the original plan for the revisions; it was agreed that the original plan and all amendments were later approved by HHFA.

The Urban Renewal Plan contains on page one thereof a table of contents which shows that Section A of the Plan is the table of contents, Section B is a description of the project. Section C is Land Use Plan and Section D is project proposals. Section E contains other provisions necessary to meet state and local requirements. Section F relates to changes in the approved plan and Section G is the Appendix, being two maps. It is to be observed that under Section C, being "Land Use Plan", appears all matters relating to the use of the land by redevelopers.

Such Section C of the Urban Renewal Plan more specifically, provides that the use of Parcels T-1 and T-3 shall be for motor hotel and certain limited retail purposes if accessory to motor hotel use. Subsection (a) thereof requires that there be a minimum lot area of 750 square feet per unit, off-street parking of one space per unit and a maximum floor area ratio of .5. A floor area ratio of .5 means that the total building floor area may not exceed one-half of the total lot area. Subparagraph 3 provides that zoning districts are as shown on attached maps and further provided that "Whenever these regulations and

controls are at variance with the provisions of the Des Moines zoning ordinance, the more restrictive regulations shall take precedence." Parcels T-1 and T-3 were zoned C-2 according to the attached map. The zoning ordinance at Section 2A-24 thereof entitled "Height Regulations" under C-2 provides "no building shall exceed three stories or 45 feet in height . . ."

Petitioner's case is bottomed on the proposition that under the Urban Renewal Plan, no structure on Parcels T-1 and T-3 could exceed three stories or 45 feet in height, and that the City was legally incapable of accepting bids which contemplated structures in excess of the limitation.

In its Petition, the Plaintiff alleged that under the Urban Renewal Plan, in effect at the time of the invitation of the City for bids and the filing of bids, provided for structures upon the premises of not to exceed three stories or 45 feet in height. Plaintiff further alleged that it and Sheraton filed proposals to purchase T-3 and that National Motor Inn Corp. filed a proposal to purchase T-1, and that Boss was interested in purchasing T-1. The Petition further alleged that the proposals of Sheraton and National Motor Inn provided for structures in excess of those permitted by the Urban Renewal Plan in that Sheraton proposed an eight-story motor hotel and National Motor Inn proposed a five-story hotel. Plaintiff alleged that any action of such Defendants to purchase said parcels upon the basis of their proposals and any action on the part of the City to sell on such basis violated the Urban Renewal plan, and that any contracts for the performance thereof arising out of said proposals and acceptances be illegal, inequitable, improper and void: wherefore Plaintiff prayed for the injunction (R. 3).

At the trial it developed that the various proposals were made in response to an invitation for bids contained in the City's Land Disposition Documents Packet (R. 271).

The Urban Renewal Board fixed the cutoff date for receiving proposals at November 2, 1964 at 9:00 o'clock A. M. On November 2, 1964 prior to 9 A. M., Boss filed its proposal and Sheraton filed its proposal. Holiday had earlier filed a proposal to purchase Parcel T-3 and National Motor Inn had earlier filed a proposal to purchase Parcel T-1.

The Urban Renewal Board considered the various proposals at its meeting November 10, 1964 and voted to recommend to the Council acceptance of the proposals of National Motor Inn to purchase T-1 and the proposal of Sheraton to purchase T-3. On November 16, the City Council adopted Roll Calls accepting the bids of Sheraton and National Motor Inn.

Briefly stated, Boss offered to pay $240,000 in cash and erect a motor hotel varying in height from two stories to six stories. Sheraton offered to pay $236,396.70 and proposed to erect a motor hotel eight stories in height. Holiday offered to pay slightly less than $240,000 cash and proposed a three-story structure; price later increased. National Motor Inn offered to pay the minimum cash price for Parcel T-1 and erect a five-story motel.

On November 16, 1964, **and after the cut-off date for receiving bids**, the City Council amended paragraph C (3) (b) of the Urban Renewal plan by substituting in lieu thereof the following:

> "Recommended zoning districts were established as most closely approaching the regulations and controls for the area. Height regulations and restrictions found in the Des Moines Zoning Ordinance shall not apply to improvements constructed of which may be constructed on disposition Parcels T-1 and T-3. In other matters wherever these regulations and controls are at variance with the provisions of the Des

Moines Zoning Ordinance, the more restrictive regulation shall take precedence" (R. 318).

It is thus apparent that the Urban Renewal plan was not amended so as to permit structures in excess of three stories to be erected until **after** the Council and the Urban Renewal Board received the bids of Boss, Sheraton, National Motor Inn and Holiday.

On March 15, 1965, the City Council by Roll Call 850 purported to formalize the modifying of the Urban Renewal plan in the respect above stated and further eliminated the requirement that the more restrictive provisions of the Des Moines Zoning Ordinance should take precedence over uses and restrictions contained in the Urban Renewal plan. Later the City Council approved as satisfactory proposed formal contracts between the City and Sheraton and the City and National Motor Inn.

At the trial Jack Drey, a Boss architect, testified that he visited the Urban Renewal office prior to the preparation of the Boss bid and was told by someone there to not be concerned about the height and floor area ratio matters. He reported this to Mr. Edwin A. Boss, the President and Chief Executive officer of the Petitioner. Paul Lefton, on behalf of Boss, then visited the Urban Renewal office, was given the Land Disposition Documents and was told he need not worry about the three-story limitation on height inasmuch as the Board of Adjustment would probably grant a variance. James Dougher, a member of the architectural firm of Dougher, Frevert, Ramsey, Architects and Engineers, testified that a change from low-rise to high-rise would enable the developer to effect a savings in unit cost of approximately $400.00 per unit. Mr. E. A. Boss testified that if he could have proposed a high-rise development of eight or ten stories he would have offered $15,000 more for the land. Mr. Boss further testified that Parcel T-1 was only suitable for a

high-rise structure and that he would have submitted a bid for the parcel if there were no height restrictions.

Don Swanson, an attorney and a member of the Urban Renewal Board, testified on behalf of the Plaintiff that the Urban Renewal Board expected bids or proposals to be submitted in the light of the Urban Renewal plan. Mr. Max Krumery, Chief Staff Officer of the Urban Renewal Board, admitted that the Urban Renewal plan was the guideline for bidding.

On May 24, 1965, the Trial Court filed its Findings of Fact and Conclusions of Law, Summary and Direction. The Trial Court without giving reasons therefor simply stated that the Plaintiff had failed to make a case and that the City had provided reasonably competitive bidding procedures. In connection with various affirmative defenses of the Defendants, the Trial Court simply stated that the Plaintiff lacked standing to sue. On May 27, 1965, a Decree was entered dismissing the Petition.

At the trial Boss Hotels introduced in evidence the Loan and Grant Agreement between the City and the United States. Section 106 of such contract provided that the City will "not sell, mortgage, lease or otherwise dispose of or encumber any of the project land which is held by it as a part of the project, except in accordance with and in order to carry out the Urban Renewal plan." And subsection H of said section 106 further provided:

> "When project land is sold or leased by the local public agency it will obligate the purchasers or lessees as the case may be and the assignee of such purchasers or lessees (1) to devote such project land to the uses specified in the Urban Renewal plan . . .".

Boss also introduced in evidence the Urban Renewal Manual.

Paragraph 8 of Boss Hotel's Petition filed in the Polk County, Iowa District Court, alleged:

"The proposals of the said Defendant Developers do not meet the requirements of the said Urban Renewal plan in that, among other matters, said Defendants proposed to erect motels in excess of three stories or forty-five feet in height upon said parcels, in violation of section 403.8, Code of Iowa, 1962."

In the opinion of your petitioner such allegation raised the question as to whether the proposed sales met the Federal requirement of adherence to the Urban Renewal plan.

On May 24, 1965 the Trial Court filed its Findings of Fact and Conclusions of Law. In the findings the Court said that under the Urban Renewal plan hotels exceeding three stories or forty-five feet in height could not be legally erected on either parcel T-1 or T-3. In its conclusions of law, the Trial Court simply held "that the Plaintiff has not established" its claim that the proposals of the developers did not meet the requirements of the Urban Renewal plan, and the Court further held as a conclusion that the Plaintiff had not established its allegation that the City had failed to comply with the above quoted section 403.8 of the Code of Iowa. In its Decree of May 27, 1965, the Court incorporated its Findings of Fact and Conclusions of Law and then ordered the case be dismissed and costs taxed to the Plaintiff.

In the Iowa Supreme Court the proposition submitted by Boss Hotels was the following:

"Under section 403.8 of the Code of Iowa, 1962 purchasers of Urban Renewal real property 'shall be obligated to devote such real property only to the use specified in the Urban Renewal plan.' Therefore, the bid of Sheraton and National Motor Inn cannot be accepted by the City because such bids propose structures in excess of three stories or forty-five feet in

height—a use not permitted by the Urban Renewal plan."

Inasmuch as the Urban Renewal project was financed with Federal funds and the City was bound by contract with the Federal government to devote Urban Renewal property only to the uses as specified in the Urban Renewal plan, your Petitioner in this matter contends that the Federal question was properly raised in the Iowa Supreme Court even though the basic proposition of the Plaintiff was the assertion that the proposed sales violated the Iowa statute section 403.8.

The Iowa Supreme Court in disposing of the Appellant's proposition above set forth held that the word "uses" as it appears in the Iowa statute did not extend to height regulations, and said:

> . . . "an examination of the Loan and Capital Grant Contract for the Urban Renewal project between the City and the United States, the excerpts from the Urban Renewal Manual, the Urban Renewal plan and the zoning ordinance of Des Moines, as these appear in this record, do not equate a use of the land with restrictions on the height of buildings."

The Supreme Court of Iowa then affirmed the lower court.

(g) Not applicable.

(h) The writ should be allowed because both the Federal regulation, being the above quoted excerpt from the Urban Renewal Manual, and the City's contract with the Federal government required that the property be devoted when sold to uses in accordance with the Urban Renewal Plan. Petitioner contends that the word "uses" includes the height restriction and that hence both the Trial Court and the Iowa Supreme Court failed to give proper recognition to the Federal requirements.

(i)-(j) The opinion and judgment of the Iowa Supreme Court appear in the Appendix. Also, the Appendix contains the pleadings, the Findings, Conclusions, Summary and Direction of the Trial Court and the Decree of the Trial Court.

Wherefore, Petitioner prays that certiorari be granted.

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